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## THE REQUISITIONED AND THE GOVERNMENT-OWNED SHIP

### JURISDICTION IN THE COURTS OF GREAT BRITAIN, FRANCE, AND THE UNITED STATES

**J**URISDICTION over requisitioned and government-owned merchantmen and their liabilities under maritime laws are questions which present no real novelty. They were regarded by the ancient sea-law and were as familiar to it as they have recently become, on account of the exigencies of the late war, to the admiralty systems of to-day. The maritime law of Rome supplies modern cases with the most cogent parallels and is reflected today in the jurisprudence of France and other continental and Latin countries. The jurisdictional question which figures most prominently in these cases relates to the authority to arrest or libel the property of a foreign sovereign. It is still in the controversial state in the United States. In France, administrative law has dealt with the question in a manner both practical and consistent with the best principles of jurisprudence. In British law, public use, as distinguished from the possession of the government, affords immunity from arrest to the requisitioned or publicly owned merchant vessel of a foreign sovereign.

The subject of the government-owned and requisitioned ship, in fact, far antedates Roman Imperial law. In the oration of Demosthenes against Dionysodorus, in the Athenian courts, we have an action on a bottomry loan made to the masters of a vessel as agents of the Governor of Egypt, both cargo and ship doubtless belonging to the Egyptian State. Vessels encargoed for the account of the Roman Government are frequently referred to in Justinian. Their status is closely analagous to that of the requisitioned ship. Numerous laws appear regulative of their voyages,<sup>1</sup> extending immunities to their owners, masters, and mariners,<sup>2</sup> fixing their responsibility with respect to transportation, imposts and deliveries,<sup>3</sup> penalizing illegal traffic in commodities transported for the state, and forbid-

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<sup>1</sup> The Code, Lib. XI, tit. 1, frag. 8; Lib. XI, tit. 5, frag. 3.

<sup>2</sup> Lib. XI, tit. 1.

<sup>3</sup> Lib. XI, tit. 1, frag. 4, 5, 6, 7.

ding deviations. Apparently the entire merchant marine of Rome was subject to government requisition whenever and wherever public need demanded it. The law imposed heavy penalties, including often confiscation of the ship, for evasions of this duty of the ship owner toward the state. Displacement fixed the class of vessels liable to requisition and no excuse, proprietary privilege, or even imperial sanction availed to exempt the ship owner. All the ships on the Tiber were equally liable to government use. So exclusive was the right of the state, that those who placed their merchandise aboard vessels already encargoed for the government, not only incurred severe punishment, but became liable for the perils of the sea.

The real value of this historical aspect of the question, as it is presented to British and American courts of Admiralty, is apparent when it is observed that under the administrative law of Imperial Rome the greater part of state properties was submitted to both the rules and procedure of the civil law. Fiscal properties were distinguished from communal, and both of these from the private domain of the Emperor, in whom the title to public property *extra-commercium* appears to have vested;<sup>4</sup> but even the private domain of the Emperor was subject to all legal measures known to the civil law of Rome incident to the acquisition, alienation of, and acquiring of security in property. Excluded from that part, *extra-commercium* of the *patrimonio romani populi* or patrimonial property of the Roman state, the properties controlled by the Imperial "Fisc" such as mines, forests, etc., while administered largely by Imperial rescripts, were subject to all the obligations imposed by the municipal law of Rome. It was not different in the realm of maritime affairs. The property, movable and immovable, of ship-owners, masters, and mariners in Roman law was subjected by virtue of Imperial rescripts to the obligation of liens to secure the performance of contracts of affreightment with private parties, and these measures probably extended to bottomry hypothecations. It is significant that these liens given by Imperial law were *in rem* and attached to all property of mariners, though in the hands of innocent purchasers, and survived until perfect satisfaction of the obligation first incurred, even though it happens, says the law, "that

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<sup>4</sup> Lib. XI, tit. 70.

such property comes into our (the Imperial) patrimony.”<sup>5</sup> It is therefore clear that in Roman law the personal contractual obligations of ship-owners, etc., gave rise to rights *in rem* which were not extinguished by the property so invested with a lien coming into the ownership of the Emperor or state. “The charge is in the thing and not on the person,” says the rescript, the lien only being divested if the property ceases to be alienable and is subordinated to some purpose, *extra-commercium*. No evasion of the pecuniary responsibility of mariners for the safe transport of government cargoes is countenanced by Roman law, which rule affords further evidence that vessels requisitioned by the Roman state did not by reason of that alone enjoy any exemption from liability *in rem*.

In view of the fact that Roman law gave a lien in favor of the shipper enforceable against the ship or other property of its owner, though the same had come not only into the possession but into the ownership of the Roman state or its Imperial representative, and of the further fact that this right arose out of contractual obligation and affected property *in commercium* with respect to which even Imperial Rome could set up no defense of immunity from suit, the continental system as exemplified in the modern practice of France is thoroughly understandable. In general, the requisition of a merchant vessel, say French authorities, does not alter ownership, but temporarily suppresses its enjoyment.<sup>6</sup> The indeterminate character of the state’s obligation to the ship-owner and the reciprocal rights, duties, and liabilities of the latter with regard not only to the state but third parties have ultimated in the adoption of uniform types of charter-parties and contracts of carriage and of hire. The general requisition in 1918 of the French merchant marine was characterized by the assumption by the state of the liabilities of an insurer, both with respect to marine and war risks, and the submission of all controversies arising under the charter-party to the jurisdiction of the administrative courts. Contracts relative to the commercial exploitation under private management of French vessels, or those formerly of enemy ownership, or, again, of neutral or allied ships under requisition to and laden for the account of the French government, uniformly refer jurisdiction to the cog-

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<sup>5</sup> Lib. XI, tit. 2.

<sup>6</sup> Collin, Situation de l’armement maritime en France, 1914-19.

nizance of the administrative courts and make no exception, because of sovereignty, with respect to the justiciable character of suits respecting shipping so affected to public use or belonging to the state. The jurisdiction of the administrative courts in France, as compared with courts having regard to the civil relations of citizens *inter se*, is characterized by essential differences in the legal principles applied governing the relations of the individual and the state. The relation of the administrative courts to the judicial is comparable to that which equity bears to the common law in Anglo-American law. There is no analogy between the French administrative system and the constitutional relations between American governmental authorities and citizens, nor to the functions and powers of the Crown and its servants in England which must be exercised in accordance with those ordinary common law principles governing the relations of one subject to another. In France the rights of parties under public law depend upon administrative acts whose interpretation results necessarily to the administrative courts. Acts of executive power constituting so-called *actes de gouvernement* may be limited to a very restricted class outside of which no administrative act could properly be regarded as an act of the state drawing to it immunities in favor of sovereignty; or, in the opinion of other writers, any executive act united with a political aim (*inspiré par un mobile politique*) may be treated as an act of state which lies outside the jurisdiction of any court whatever.<sup>7</sup> With these general considerations in mind, it is apparent that the intervention of the state in maritime affairs creates a very important branch of French maritime law as well as a most varied control of shipping, private and public. It exhibits some incongruity in the survival of very ancient rules. As a distinct branch of French maritime law it remains unqualified, except for some general compilations of the older regulations and modern ordinances, rules, and statutory enactments. French maritime law itself, while theoretically comprehending the totality of juridicial relations between private persons engaged in maritime transport, is divisible between the civil and commercial jurisdictions, the greater part, relative to

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<sup>7</sup> Compare Laferriere, *Traité de la Juridiction Administrative*, II, Lib. IV, ch. 2, p. 32, and Hauriou, *Précis de Droit Administrative*, pp. 282-7, with Jacquelin, *La Juridiction Administrative*, pp. 438-17.

the ownership of vessels and their transmission being purely civil law; nor is the maritime law of France a mere accessory of the commercial law. That part destined to be regulative of the relations of purely private law bears the unmistakable imprint of the administrative regulations and rules of public law.

These salient distinctions are seen in French law and judicial opinion relative to merchant vessels owned or requisitioned by the state. It is apparent from an examination of the extensive legislation in France controlling the French merchant marine and its requisition by the state during the late war, together with decisions relative thereto, that French jurisprudence has not regarded the participation of the state in maritime affairs as conferring any immunity in respect of civil obligations, but in full appreciation of the justiciable character of the controversies which have arisen has submitted them to the ordinary municipal law of France, though cognizance has been restricted to the administrative tribunals. While the state in the event of a collision between a private ship and a war vessel must bring its claim in the judicial courts, the victim of the collision must cite the state before the *Conseil d'Etat*, appealing from a decision of the Ministry of Marine refusing indemnity.<sup>8</sup> The administrative tribunals are equally competent when the ship is affected to public uses of the state.<sup>9</sup>

As a general principle of French law, the French courts are incompetent to take jurisdiction of controversies between foreigners not domiciled in France respecting either personal rights or movable property. In a recent decision<sup>10</sup> the ship *Kolaos*, which it was alleged by the government of Greece had been fraudulently sold to an Italian, armed, and placed in the government service of Italy, and which it was the purpose of the Greek government to requisi-

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<sup>8</sup> Trib. des Conflits, Jan. 17, 1874, D. 74, 3, 4; Cour d'Etat, May 11, 1870, D. 71, 3, 57; Feb. 15, 1872, D. 73, 3, 57; April 15, 1873, D. 73, 3, 58; July 22, 1899, Clunet, 1894, p. 813; March 19, 1897, Revue internationale de droit maritime, XXII, 663; March 16, 1900, *ibid.*, XVIII, 142, D., 1901, 3, 57, S., 1902, 3, 64.

<sup>9</sup> Trib. des Conflits, July 6, 1912, R. I. D. M., XXVIII, 530. See also Ripert, Droit maritime, XI, 529, par. 1926.

<sup>10</sup> The Government of Greece v. The Government of Italy; Ambatielos and Société Nationale de Navigations de Genoa, Cour d'Appel de Bordeaux, Dec. 4, 1917.

tion, was arrested in the Port of Bordeaux. The French court refused to take jurisdiction of this litigation between the Italian and Greek governments since to do so would have involved them in the regulation of international relations. Incompetency was asserted *ratione materia*, since adjudication would have necessitated the construction of both foreign law and diplomatic conventions and consequently the international public law of the contending governments, each of which relied upon its sovereign rights which the French court affirmed were above ordinary judicial process. It is, however, notable that the decision condemned the Greek government to the payment of an amend and all the expenses of the appeal and previous trials. Both governments were *en presence* and there appears to have been no refusal to appear emanating from diplomatic sources nor plea to the jurisdiction. It is further noteworthy that whereas the conservatory measures demanded by the Greek government to secure the requisitioning of the vessel were refused, nevertheless the vessel throughout this prolonged litigation was detained in port as a result of *saisie conservatoire* authorized by the administrative tribunal. It was the substantial holding of the court that further sequestration of the vessel would be in exercise of an unauthorized jurisdiction. Two facts regarding the French law of *saisie conservatoire* are of importance in this connection: the arrest of a vessel under French law does not confer jurisdiction upon the commercial court,<sup>11</sup> nor does the jurisdiction of such court arise from the maritime lien which would justify in Anglo-American practice a libel *in rem*. What in effect occurred in this important decision was a refusal on the part of the judicial authorities to concede an executory title in favor of the Greek government. A defect of jurisdiction being involved, the validity of the arrest was contested, a question with respect to which the tribunals of commerce are not competent to adjudicate but which must come before the appropriate civil tribunal. The Cour de Cassation has so held many times.<sup>12</sup> The case did not involve a vessel requisitioned or owned by the government of France and consequently its adjudication was

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<sup>11</sup> Cour d'Appel de Rouen, May 15, 1918, R. D. I. M., XXXI.

<sup>12</sup> Cass., Aug. 22, 1882, D. 83, 1, 214; Cass., Nov. 11, 1885, D. 86, 1, 68; Tunis, Feb. 21, 1889, R. I. D. M., V, 130; Oct. 5, 1893, *ibid.*, IX, 84; Havre, Oct. 16, 1894, *ibid.*, X, 439.

not a matter of exclusive jurisdiction in the administrative courts.

The *Tribunal Civile de Bordeaux* has held very recently<sup>13</sup> that a vessel belonging to the American government, though under charter to private parties, enjoyed an immunity from attachment (*saisie arrêt*) which extended to its papers. These it appears had been attached by order of customs and port authorities. The principle asserted by the court of the immunity of vessels belonging to foreign governments as being of universal recognition cannot be admitted. Continental jurisprudence is divided on the general question of the *saisissabilité* of the property of a foreign sovereign or state. France, Belgium, and Germany, like England, take a position contrary to that of Italy. For the immunity claimed, we find Foelix, Rolin-Jacquemyns, Bomans, Bynkershoek, Westlake, Field, Droop, Cuvelier, Laurent, Holtzendorff, Carré-Chaveau, Dalloz, Frazier-Herman, Lawrence, Aubrey, Rau, Pradier-Fodéré, Chavegrin, Vattel, Chrétien, Fiore, Heffter, Demolombe. In favor of the competency are Von Bar, Calvo, Klüber, De Paëpe, Demangeat, Von Martens, Bonfils, Legat, Despagnet, Piédelièvre, Spee, Gabba, Phillimore, Bluntschli, Weiss, Gianzana, Von Heyking, and Gillespie. It is probable that Lawrence and Fiore would admit the exception to the general rule of immunity where the property is destined to use *in commercium*, very clearly recognized by Gabba and Von Bar. While the Bordeaux decision turned upon the destination of the attached property to public use or service and is founded upon a number of preceding decisions, it is very significant that the court, referring to the learned dissertation of Professor Gabba of the University of Pisa,<sup>14</sup> comments favorably upon his distinction between acts of commerce and of government exercised by the state, admitting the arrest of vessels belonging to foreign governments where such are engaged in ordinary commerce. "It seems in effect equitable to assimilate the state acting as an individual to the individual himself."

A distinction however may be observed between *saisie conservatoire* and *saisie arrêt*. The latter is civil in character and predicated upon an execution-title in him who seeks to effect the arrest. The general rule is that vessels which are not the subject of private prop-

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<sup>13</sup> April 27, 1920.

<sup>14</sup> Clunet, 1890, p. 41.



erty or those which are affected to a public use cannot be seized in execution of judgments.<sup>15</sup> It is not to be inferred, however, that provisional arrest, the *saisie conservatoire*, is not effective or sanctioned by French law and practice against requisitioned and government-owned vessels. In fact, it is specifically allowed for French vessels under the law of April 10, 1906, Arts. 1, 7. In France the law does not provide for seizure and execution against foreign-owned vessels, but notification is made to the consul of the nation to which the vessel belongs under the authority of the consular convention. *Saisie conservatoire*, in ordinary cases, is available to creditors of the shipowners independently of their civil right *in personam*. It is consequential to their *droit de suite* which is a right, perhaps not co-extensive with the Anglo-American maritime lien, but independent of possession and good against all the world. In effect it may be concluded that the virtual libel of government-owned and requisitioned vessels whether French or foreign is not outside the power of French commercial courts or other maritime authorities, judicial or administrative. If, as held in *The Kongsli*,<sup>16</sup> *saisie conservatoire* is not to be assimilated to an action *in rem* but to a personal action, and if British and American decisions, however rightly, attribute the character of suits *in personam* to civil actions in France terminating in the *saisie-execution* of the ship and its sale,<sup>17</sup> the distinction becomes vital between seizure for purposes of execution sale in French law, comparable to sale by sheriff under a *fieri facias* at common law, and the provisional arrest and detention of a vessel under the French *saisie conservatoire*. The latter is essentially the vindication of a property right in the vessel. Its recognition as such by American courts is an essential and necessary step in the determination of the question whether the property *in commercium* of a state may be subjected to process in admiralty. In Continental law it must also be borne in mind that this is an administrative rather than a judicial act. In Italy, at least, the complementary action of the executive power is no less assured

<sup>15</sup> Ripert, Vol. I, par. 892; Mittelstein, De la saisissabilité ou de l'insaisissabilité des navires, R. I. D. M., IX, 91, 648; X, 364; Guilibert, De l'insaisissabilité des navires affectés à un service postal, Clunet, 1885, pp. 515, Aix, Aug. 3, 1885, Clunet, 1885, p. 554.

<sup>16</sup> 252 Fed. 367.

<sup>17</sup> *Castrique v. Imbrie*, L. R. 4 H. L. 414 (1870).

than if the judge were invested with both *jurisdictio* and *imperium*, the administrative authorities not being able to dispense with the duty to conform to civil judgments against the state.<sup>18</sup>

The courts of Italy have gone far in deciding "that when a government binds itself by contract of a private character, it can be summoned by the creditor in any foreign court where such an one resides."<sup>19</sup> This decision proceeded on the theory that an action against a foreign state might be entertained, *ratione materia*, if the foundation of the action were such as pertains to the ordinary administration of the state in which the foreign government has not acted *jure imperii* but *jure gestionis*. Foreign states or sovereigns conducting economic or commercial activities in Italy are amenable to the municipal law thereof and subject, not only to the jurisdiction of its courts, but to the execution of judgments. As a general rule, in so far as the property of the continental nation is alienable in character and destined to commercial use, it is subject to the rule of municipal law as other private property. The performance of commercial acts by the state does not confer upon a government the character of a merchant, but leads, however, to the usual consequences resultant upon commercial transactions. French jurisprudence very uniformly refers adjudication in respect of acts of commerce effected by the state or its officers, or liability incurred by its vessels under French maritime law, to the administrative tribunals upon principles of common law as well as the special rules of administrative law.<sup>20</sup>

British law is averse to the arrest of King's ships, or vessels belonging to civil departments of the British government, as well as those in government service belonging to private owners, and extends like immunity to vessels which are the public property of foreign states, though engaged in trade, since they are destined to public use. However, British law permits suits *in personam* against

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<sup>18</sup> See Gabba, *Clunet*, 1888, p. 180; 1889, p. 538; 1890, p. 27.

<sup>19</sup> *Cour de Gand*, March 14, 1879, J. VIII, p. 82, March 22, 1887, J. XV, p. 289.

<sup>20</sup> See the *Navire Dalemor*, *Cour de Commerce de Marseille*, Aug. 10, 1915, R. I. D. M., XXX, 372; *Navires Jean Bart, Phocéen, Girelle*, *Trib. de Com. de Marseille* (requisitioned ship, action against the state), June 29, 1915, R. I. D. M. XXX, 367.

the postmaster and other responsible officials, and while the Lords Commissioners of the Admiralty cannot be called upon by the owners of merchants to answer in a suit for damages they usually instruct their solicitor to defend.<sup>21</sup> While the same rule of immunity from arrest avails in respect of vessels employed mainly or wholly for public purposes, such as vessels of war, in the case of a requisitioned ship where the possession of the government was merely temporary the warrant was set aside but it was stated that an action could be brought against the owners. In other words, a writ could be issued.<sup>22</sup> Thus it is apparent that while the ship of a sovereign power is not under the British law liable in an action *in rem*, and all proceedings can be set aside,<sup>23</sup> the British admiralty court is not incompetent to give relief. It will indeed take jurisdiction so far as to arbitrate where the foreign sovereign consents. It seems obvious that it is judgment *in rem*, good against all the world under both American and British systems, which the British courts decline to pronounce for the reason that it would be incompatible with the position and dignity of the foreign sovereign to enforce such a judgment against his property.

In determining the public status of a vessel which will draw to itself the immunity accorded the property of a sovereign, a little considered but really very important element is the question of the assumption of risk of sea-damage and other injury. Thus, a vessel under charter to the Crown and used as a transport, but not demised, all risk of sea-damage being at the risk of the owners, was held not to be a ship of the Crown.<sup>24</sup> More recently, requisition by the Admiralty of a tug whose owners incurred the marine risks was held not to preclude their claim for salvage which would have been denied had the Crown been the owner. Under the uniform type of charter party adopted in France relative to the general requisition of its shipping, the French government assumed all risks, an act consistent with the necessities of the war, but in no way ousting the jurisdiction of the administrative tribunals. In other words, the assumption of risk, be it war or marine, bears an important relation to the

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<sup>21</sup> See Roscoe, Admiralty Practice, 4th ed., pp. 97 *et seq.*

<sup>22</sup> The Broadmayne, [1916] P. 64.

<sup>23</sup> The Parlement Belge, L. R. 5 P. D. 197 (1880).

<sup>24</sup> The Nile, L. R. 4 A. & E. 449 (1875).

liability of the government which should not be overlooked in fixing responsibility and in determining competency.

In *Long v. The Tampico*,<sup>25</sup> the American rule as to the immunity of property of the federal government from process was extended in the federal courts to the property of foreign governments, though the immunity granted by such foreign governments in their own courts depends upon the public use to which the property is appropriated. Actual and not mere constructive possession of the United States constitutes the basis of the immunity of its property from the process of its courts. This idea is traceable to the decisions in *The Siren*<sup>26</sup> and *The Davis*.<sup>27</sup> But the opinion in the latter case was directly qualified, if not reversed, by the decision of the Supreme Court in *United States v. Lee*,<sup>28</sup> where it was said: "This examination of the cases in this court establishes clearly this result; that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed, when that fact is brought to the attention of the Court, has been overruled and denied in every case where it was necessary to decide it."<sup>29</sup> The distinction here was between a direct suit against the United States and a suit against persons asserting to hold under authority of and as officers of the United States. According to the decision in *The Davis*, "the property of the United States may be dealt with by subjecting it to a maritime lien where this can be done without making the United States a party." In *Workman v. New York City*<sup>30</sup> the Supreme Court held that the immunity of the sovereign from suit in his own court or of a foreign sovereign, by reason of international comity, liability being admitted, rests alone on inability to give redress where jurisdiction over the person or property cannot be exerted. As interpreted recently by the Supreme Court of the United States,<sup>31</sup> *Workman v. New York City* is declared to have "dealt with a question of the substantive law of Admiralty, not the power to exercise

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<sup>25</sup> 76 Fed. Cas. 491.

<sup>26</sup> 7 Wall. 152.

<sup>27</sup> 10 Wall. 15.

<sup>28</sup> 106 U. S. 196.

<sup>29</sup> 106 U. S. 196, 215-16.

<sup>30</sup> 179 U. S. 552.

<sup>31</sup> No. 25, Original, Oct. Term, 1920.

jurisdiction over the person of defendant," and it is said that "in the opinion the Court was careful to distinguish between the immunity from jurisdiction attributable to a sovereign upon grounds of policy, and immunity from liability in a particular case." "Sovereignty does not necessarily imply an exemption of its property from judicial process and jurisdiction of the courts of justice; \* \* \* it seems a fair inference from the duties of the sovereign in such cases that where a lien exists on property upon general principles of justice *jure gentium* that lien ought to be presumed to be admitted and protected by every sovereign until the presumption is repelled by some positive edict to the contrary."<sup>32</sup> Chief Justice Marshall was of opinion that "when a government becomes a partner in any trading company it divests itself so far as it concerns the transactions of that company of its sovereign character and takes that of a private citizen."<sup>33</sup>

It is apparent that immunity of the property of a foreign sovereign from suit rests upon principles of international comity, though the rule respecting the possession of the government which obtains in cases where the United States is party defendant has been extended to cases involving the vessels of a foreign sovereign. It is believed that the judicial power of the federal courts in admiralty to limit their jurisdiction because of international comity is always constrained by their obligation to protect and enforce the constitutional rights of citizens of the United States, as well as those entitled to the protection of the United States, including all such vested rights of property as arise under the general maritime law and constitute rights *in rem* or maritime liens. In the case of *The Pesaro*,<sup>34</sup> the Supreme Court of the United States has said: "By the Judicial Code, sec. 24, cl. 3, the District courts are invested with original jurisdiction of 'all civil causes of admiralty and maritime jurisdiction'; and this is a suit of that character. Whether Congress intended this statute should *include suits* against ships such as the *Pesaro* is represented to be in the Ambassador's suggestion, when they are within the waters of the United States, is as yet an open question. The statute contains no express exception of them;

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<sup>32</sup> Story, J., in *United States v. Wilder*, 3 Sumner 307, 317.

<sup>33</sup> *Bank of the United States v. The Planters Bank*, 9 Wheat. 904, 907.

<sup>34</sup> 255 U. S. 216.

but it may be that they are impliedly excepted. The *Exchange*, 7 Cranch 116, 136, 146. *If so, the implication is a part of the statute.* United States v. Babbitt, 1 Black. 55, 61; South Carolina v. United States, 199 U. S. 437, 451." This was the case of a steamer owned by the Government of Italy, libelled in rem for damage to cargo. In its earlier decision in *Re Muir*,<sup>35</sup> the Supreme Court admitted that it would "be taking a long step" to apply the doctrine of *The Exchange* to the question of immunity from arrest of the vessel in that case, the vessel being under requisition to a foreign government. The nature and extent of governmental service and control would, if inferences are to be drawn from this opinion, constitute important elements in such decision and the conclusion would be unavoidable that jurisdiction in both cases must turn upon the status of the vessel as destined to commercial use rather than some agency essentially governmental in purpose. In this latter decision the Supreme Court held that it will regard the public law of the foreign country in respect to the right of its accredited representative to intervene in admiralty suits in the courts of the United States. It would seem therefore that it should further give weight in its decision to the administrative law of such foreign country by virtue of which suits concerning its vessels, whether of war or of commerce, are submitted to administrative tribunals. Further, where the lien asserted arises by reason of foreign contract or foreign delict, it would seem that the *lex locus* enters fundamentally into the solution of this question of the immunity of requisitioned or government-owned merchant ships of a foreign sovereign.

The question whether by international law the rule of *The Exchange* is to be applied to other kinds of public vessels owned or controlled by friendly powers was not decided in *The Queen City*,<sup>36</sup> but the Court there relied on the principle exempting the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process *in rem*, holding that it applied with even greater force to exempt public property of a state used and employed for public and governmental purposes. The decision turned on a rule, not of international law but of municipal law, that the machinery of government must be held

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<sup>35</sup> 254 U. S. 522.

<sup>36</sup> No. 26, Original, Oct. Term, 1920.

exempt from seizure and sale under process against a municipality or state. The question whether a suit in admiralty brought by private parties through a process *in rem* against property of a state is not in effect a suit against the state remains open. The Supreme Court had earlier declared the immunity of a state from suit *in personam* in admiralty, brought by a private person without its consent, to be clear; that in a suit against a state by individuals, whether its own citizens or not, the admiralty and maritime jurisdiction is not excepted from the operation of the rule that a state may not be sued without its consent. In the case of *In re Hussein Lutfi Bey, Master of the Gul Djemal*,<sup>37</sup> the question whether the ship of a foreign government used and operated as a merchant vessel is, when within the waters of the United States, immune from process *in rem* was thought debatable. The Court significantly commented: "It is not plain that there is an absence of jurisdiction."

The Act of Congress of March 9, 1920, authorizing actions *in personam* against the United States in admiralty suits for salvage services, in the light of the foregoing recent decisions, fails to observe the distinction toward which the Supreme Court very obviously inclines. The statute grants a right *in personam* in the federal court, with the proviso that in view thereof the vessel shall not be subject to arrest or seizure by judicial process of the United States. Should the Supreme Court hold ultimately that the property or vessels of a state engaged in commerce are subject to maritime liens and may be proceeded against *in rem*, it is apparent that the Act of Congress must fall in this particular, since it would operate to alter the admiralty and maritime jurisdiction. In providing for the release upon stipulation of cargoes or vessels from arrest and attachment in foreign ports, in the same Act, Congress has tacitly admitted a possible jurisdictional power which appears to go farther than continental decisions indicate and include *saisie arrêt* of vessels owned, in the possession of, or operated by the United States. This provision includes a reservation that no claim to immunity of such vessel or cargo from foreign arrest shall be foreclosed or otherwise prejudiced in a proper case. But it follows that a like exemption should arise upon principles of comity in favor of foreign government-owned vessels under libel in the United States;

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<sup>37</sup> Oct. Term, 1920.

and it thus becomes essential to determine, whether the indicated attitude of the Supreme Court, should it crystallize in decision affirming the jurisdiction of the federal courts to entertain suits *in rem* against the property of the United States or of foreign sovereigns, will not make such reservation quite inoperative. The test in all these cases, whether the vessel be under requisition or otherwise in the ownership or possession and operation of government, is the use of the ship or the destination of the property to commercial uses rather than the ends of state. That this distinction presents difficulty in itself is patent. How will one differentiate strictly when the revenues of the state and so the agencies of government may be vitally affected by the profits from the government's commercial enterprises?

*New York City.*

J. WHITLA STINSON.